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No. 06-271

Supreme Court, U.S.
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In the

Supreme Court of the United States

ANDREA SKOROS, INDIVIDUALLY AND AS NEXT FRIEND OF NICHOLAS AND CHRISTOS TINE, ,
Petitioners,

v.

THE CITY OF NEW YORK et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

MICHAEL A. CARDOZO,
Corporation Counsel of
the City of New York,
Attorney for Respondents,
100 Church Street,
New York, N.Y. 10007.
(212) 788-1037 or -1056

LEONARD J. KOERNER,*
STEPHEN J. MCGRATH,
LISA GRUMET,
CHERYL PAYER,
of Counsel.
*Attorney of Record

October 20, 2006

COUNTERSTATEMENT OF THE QUESTION PRESENTED

The Holiday Display Policy of respondent Department of Education permits the display in the New York City public school system of holiday symbols and decorations including Christmas trees, menorahs and the star and crescent, when presented in the company of one or more symbols of other religions, but does not permit depictions of deities, religious texts, or scenes of worship such as the Christian nativity scene ("crèche").

Does this policy violate the Establishment Clause?

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The decision of the United States Court of Appeals for the Second Circuit, as amended March 27, 2006, is reported at 437 F.3d 1 (2d Cir. 2006); it is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 3a-121a..

The Petition for rehearing or rehearing en banc was denied by order filed May 25, 2006. The denial is reproduced in the Appendix to the Petition for Certiorari at pages App. 1a-2a .

The memorandum and order of the United States District Court for the Eastern District of New York, No. CV-02-6439, is dated February 18, 2004 and is unpublished. It is available at 2004 U.S. Dist. LEXIS 2234 and is also reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 124a to App. 156a.

STATEMENT OF THE CASE

Petitioner Andrea Skoros, on behalf of herself and her children (hereinafter collectively "petitioners") alleges that respondents have "coerced" her children to accept Judaism and Islam while conveying a message disapproving of Christianity because the respondents' holiday display policy does not permit the display of nativity scenes (crèches) in the public schools, while permitting the display of Christmas trees, menorahs, and the star and crescent. Petitioner further claims that her children have been "exposed to the Jewish Menorah and the Islamic Star and Crescent," and that her son Nicholas Tine was taught about the origin of Hanukah but not about the origin of Christmas. Petitioners challenge respondents' guidelines concerning holiday displays ("Holiday displays policy"), and respondents' alleged practice under the guidelines. They brought suit under 42 USC § 1983, and, as limited by the instant petition for certiorari, allege a violation of the Establishment Clause of the First Amendment to the United States Constitution.

Respondents assert that New York City Department of Education ("DOE") guidelines concerning holiday displays do not promote any religion, and indeed clearly prohibit the endorsement of religion. In relevant part, the guidelines as disseminated in a memorandum from the General Counsel to the Chancellor dated November 28, 2001 stated:

> The following guidelines should be followed with respect to the display of cultural/holiday symbols.

1. The display of secular holiday symbol decorations is permitted. Such symbols include, but are not limited to, Christmas trees, Menorahs, and the Star and Crescent.

2. Holiday displays shall not appear to promote or celebrate any single religion or holiday. Therefore, any symbol or decoration which may be used must be displayed simultaneously with other symbols or decorations reflecting different beliefs or customs.

3. All holiday displays should be temporary in nature.

4. The primary purpose of all displays shall be to promote the goal of fostering understanding and respect for the rights of all individuals regarding their beliefs, values and customs.

In response to a request from William A. Donohue, President of the Catholic League for Religious and Civil Rights "to put nativity scenes in public schools where menorahs and/or crescents and stars are already displayed," a correspondence ensued between the Chancellor's counsel and Donohue as to the interpretation of Supreme Court precedents on public displays of holiday symbols.[1]

The last letter from the Chancellor's counsel stated, in relevant part:

> Your reliance on Capitol Square Review Board v. Pinette is misplaced. That case involved the

[1] The correspondence is cited by the Court, App. 11a-12a.

display of a cross in a public square that had been designated as a public forum. It is well established that public schools are not public fora. In fact, case law instructs that the Establishment Clause issues must be very closely scrutinized in the special setting that schools present.

The fact that a crèche was permitted to be displayed in a private park along with other holiday symbols in Lynch v. Donnelly is inapt. Again, that case did not arise in a school setting and was expressly limited to its facts. Similarly, County of Allegheny v. ACLU does not require a different conclusion. It does not, as you claim, stand for the proposition that as long as a religious symbol is displayed with non-religious symbols, it will automatically be a constitutional display. The Allegheny court recognized that while the Menorah has both religious and secular dimensions, it has become the primary visual symbol for the holiday of Hanukkah. Further, the Court acknowledged that there is no more secular alternative symbol to represent Hanukkah. Neither of these factors holds true for the crèche. The crèche is solely a religious symbol, and there clearly are other secular alternative symbols of the Christmas holiday. There is nothing unlawful about a school district setting a policy of only permitting secular symbols of the holiday season.[2]

By permitting the display of multiple and diverse holiday symbols with secular dimensions, while restricting the display of purely religious symbols in public schools, DOE serves the secular, educational purpose of promoting

[2] The letter is cited and summarized by the Court, App. 11a-12a..

cultural understanding, while avoiding the promotion or endorsement of any particular religious faith. Display of the crèche, as a representation of the birth of a figure central to the Christian religion, and others worshipping Jesus Christ as the Son of God, is not permitted by DOE's guidelines. This restriction is not unique to the crèche; the guidelines do not permit purely religious holiday displays for other religions, such as religious displays for Rosh Hashanah or Yom Kippur, or images of deities or religious figures. Petitioners in effect seek a special status for their own religion.

Petitioner commenced this action on December 29, 2002. She filed an amended complaint on February 28, 2003. Respondents answered on April 23, 2003. Petitioner filed a motion for summary judgment or in the alternative for a preliminary injunction on October 20, 2003. Respondents moved for summary judgment on October 24, 2003. On December 4, 2003, the parties agreed to withdraw their motions for summary judgment and to present the matter to the district court for decision as a bench trial on the basis of the papers submitted and any additional material submitted by the parties.

The District Court (Charles P. Sifton, D.C.J.) issued a Memorandum Decision and Order on February 18, 2004, directing the Clerk of Court to enter judgment in favor of the respondents on all counts. The judgment issued on February 19, 2004. In its 36-page decision the District Court, applying the Supreme Court holdings of Lemon v. Kurzman, 403 US 602 (1971), Lynch v. Donnelly, 465 US 668 (1984) and County of Allegheny v. Greater Pittsburgh ACLU, 492 US 573 (1989) found that respondents' Holiday Displays policy had not violated any of

Petitioners' rights. Specifically, the District Court found that the Holiday Displays policy "by its terms, states a secular purpose." Appendix to Petition (App.) 138a. The Court also found that the circumstances surrounding the adoption of the policy, including consultation with lawyers, DOE's counsel, and the Corporation Counsel's office, indicate that the stated purpose is not a sham but that rather the policy was devised "with an eye towards parity and a concern that the holiday displays do not promote or celebrate any single religion or holiday" App. 139a. The District Court then found that "the advancement of a secular program of education, and not of religion, is the primary effect of the policy and its interpretation," App. 144a, and concluded that the policy avoided both "the entanglement that would ensue if the DOE had to police each and every display in every public school year after year" and the necessity to "exclude any reference to Christmas, Chanukah, and Ramadan," App. 149a, a result not demanded by the Establishment Clause.

The Court of Appeals for the Second Circuit affirmed by a two to one vote, holding that "the respondents do not violate the Constitution when, in pursuing the secular goal of promoting respect for diverse cultural traditions, they do not include a crèche in such displays, representing Christmas through a variety of that holiday's well recognized secular symbols, even though Chanukah is represented by the menorah and Ramadan by the star and crescent." App. 6a-7a.

Circuit Judge Straub concurred in the majority's affirmance of the District Court's rejection of Petitioner's Free Exercise and parental rights claims, which is not challenged on this petition. He dissented from the

majority's decision on the Establishment Clause claim, and stated that "My chief disagreement with the majority is as to the 'reasonable observer' in this case." App. 83a. The dissent argues that the appropriate focus of an "effects" inquiry should be on the "reasonable student observer" who may be an elementary school student, App. 95a, and a "reasonable parent observer" who is the parent of such a student (99a).

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between the Circuits. The Second Circuit's Decision Was Consistent With And Built Upon Other Case Law.

There is no conflict between circuits.

Petitioners attempt to create the illusion of a conflict by mischaracterizing the Second Circuit majority opinion. First among these misstatements is the allegation that the majority failed to view the effect of the policy "from the perspective of young and impressionable students" and "failed to properly consider the public school context of this case." Petition Points III and IV.

Petitioners repeat, like an incantation, the fact, disputed by no party and no circuit, that the public school context is different from, and more sensitive than, public displays in non-school contexts. However, an examination

of the majority opinion shows that the majority in no way ignored the special character of the public schools.[3]

The Petitioners also incorrectly allege that the majority's decision is "in conflict with decisions from this and other federal courts." Id.[4]

The majority, after first discussing the holiday display precedents of the Supreme Court and its own and other circuits, stated "[W]e now confront the constitutionality of holiday displays in a different and more

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[3] The three cases cited in footnote 7 on page 12 of the Petition for Certiorari in this respect stand only for the undisputed proposition that the focus of a court's analysis must be on the "effect on the elementary school students" who are the "intended audience" due to the "impressionability of young elementary-age children." In relevant respect, these decisions are indistinguishable from the majority's holding in the instant case, as explained post.

[4] Recent circuit decisions on this issue include O'Connor v. Washburn University, 416 F.3d 1216, 1228 (10th Cir. 2005) (effect prong of the endorsement test presumes a reasonable observer "aware of the history and context of the community and forum" in which the display appears); Rusk v. Crestview Local School District, 379 F.3d 418, 420-422 (6th Cir. 2004) (rejecting Petitioner's contention that court should assess school's practice from the perspective of a student); American Civil Liberties Union v. McCreary County, 354 F.3d 438, 461 (6th Cir. 2003), aff'd, 125 S.Ct. 2722, (2005) (reasonable observer "is charged with knowing the history of the respective displays"); Altman v. Bedford Central School District, 245 F.3d 49, 75 (2d Cir.), cert. denied sub nom. Dibari v. Bedford Central School District, 534 US 827 (2001) (the reasonable-observer test is an objective standard).

difficult context: public elementary and secondary schools." App. 30a.

Similarly, the majority emphasized the public school context in discussing the policy's stated purpose and finding it permissibly secular:

> In teaching the lesson of pluralism in New York City public schools, the defendants confront a greater challenge than the one at issue in Kiryas Joel,[5] simply by virtue of the enormous size of the City school system and the extraordinary cultural diversity of its student body. Moreover, because a significant number of New York City school children or their parents are immigrants, sometimes from countries that place little value on either diversity or tolerance, City schools play a particularly important role in teaching these essential elements of pluralism to future generations of Americans. The fact that they do so, particularly at lower school levels, through cheerful multicultural holiday displays rather than formal textbook assignments, does not diminish the importance of the lesson, much less call into question its secular purpose.

App. 37a.

The majority stated that "[W]e assume the objective observer is an adult who, in taking full account of the policy's text, history and implementation, does so mindful that the displays at issue will be viewed primarily by impressionable schoolchildren (emphasis added)." App. 44a-45a. The majority also discussed the "special concerns [that] arise in the identification of a reasonable observer" in

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[5] Board of Education of Kiryas Joel Village v. Grumet, 512 US 687 (1994).

a city's public elementary and secondary schools." App. 59a-62a. This language mirrors that in Edwards v. Aguillard, 482 US 573, 585-585 (1987).

The majority did not create a split among the circuits, as appellants alleged. The majority applied the "reasonable observer" analysis as laid out by this Court in Good News Club v. Milford Central School, 533 US 98, 119 (2001), and in Justice O'Connor's concurrence in Elk Grove Unified School District v. Newdow, 542 US 1, 34 (2004) (O'Connor, J., concurring), two recent decisions concerning religion in the public schools that are neither discussed nor cited in the Petition for Certiorari.

The majority also discussed McCreary County v. ACLU, 125 S.Ct. 2722, 2734 (2005) which reaffirmed that a reasonable objective observer must take full account of the "text, legislative history, and implementation of the statute." App. 44a.

The majority opinion stated, "We agree that the intended recipient of a display message is a factor -- undoubtedly an important factor -- to be considered by the reasonable objective observer whose perceptions determine whether the government acts with a purpose and effect that violates the Establishment Clause, but we do not think the intended recipient of a display necessarily defines the objective observer." App. 45a-46a.

The majority concluded that "when the issue is whether an immature mind would process the same information differently, some evidence on that point may well be necessary to permit a judge to conclude, as the

dissent does here, that displays that would communicate pluralism to an objective adult would communicate religious endorsement to a Jewish or Muslim child." App. 51a.

However, even if one deemed the youngest schoolchildren to be the relevant "objective observer" rather than, as the majority did, the intended audience, the petition fails to show that this would change any other part of the majority's analysis. The majority opinion enumerated the variety of holiday symbols that were displayed in the Tine children's classrooms during the relevant times. App. 12a-19a. Those symbols included not only the disputed menorah, star and crescent, and Christmas tree, but kinaras (a Kwanza symbol), a wall covering resembling a large gift box, an American flag, dreidels, App. 12a-13a, snowflakes, Christmas wreaths, stockings, snowmen, Santa Claus, App, 13a-14a, reindeer with shiny red noses, five-pointed stars, single candles, gingerbread boys and candy canes, App. 16a-17a. No symbol was displayed in isolation, but invariably surrounded by symbols of other religions or traditions. App. 48a-49a.

The majority thus properly concluded:

> Thus, when menorahs or stars and crescents are displayed, their religious significance is appropriately neutralized by myriad accompanying symbols of other winter holidays having nonreligious as well as religious origins. As a result, no objective observer of the displays in evidence would understand the respondents' purpose to be other than that stated in the Holiday Display Memo, that is, to promote schoolchildren's understanding and respect for the

> many cultural traditions celebrated in New York City during the winter holiday season. Certainly, no objective observer would understand the purpose of the displays to be the endorsement or promotion of Judaism or Islam or the denigration of Christianity, as alleged by the Petitioner."

App. 49a (footnote and citations omitted).

II. The Court of Appeals Majority Correctly Held that the Policy Represents a Reasonable Means for Respondents to Avoid Establishment Clause Violations in their Schools and Does Not Express a Denominational Preference or Hostility to the Christian Religion.

The majority correctly noted that Petitioners' attempt to compel inclusion of the crèche is not required by Establishment Clause jurisprudence. It remarked that the Christian holiday of Christmas is well represented in the City's holiday displays policy through "a variety of well recognized and beloved symbols, including the Christmas tree, Santa Claus, reindeer, candy canes, gingerbread boys and girls, tinsel garlands, strings of lights, not to mention Christmas wreaths, candles, stars and presents." App. 55a. Many of these symbols have their origin in religious doctrine and imagery. App. 55a, n24.

"In fact, the policy strives to minimize the use of religious symbols to avoid Establishment Clause concerns. To the extent that [the holiday display policy approves the use of the menorah and the star and crescent in holiday displays, that decision appears to have been reached only after respondents determined that Chanukah and Ramadan could not reasonably be represented without these symbols and that such symbols could be incorporated into secular holiday displays celebrating pluralism. * * * [N]othing in the record indicates that the policy is in any way 'directed' at having schoolchildren utilize certain religious symbols qua religious symbols." App. 35a, n15.

The majority also noted that the DOE relied on Supreme Court precedent in devising their policy. The

majority cited to an affidavit from the DOE's then General Counsel that explained that "to ensure compliance with the Establishment Clause, the DOE's holiday display policy seeks to avoid the use of any holiday symbols that depict deities." App. 54a.

In particular, the majority noted the Supreme Court's decision in County of Allegheny v. ACLU, 492 US 573 (1989) holding that "a menorah -- although a religious symbol -- can constitutionally be integrated into a public holiday display that has a secular rather than religious purpose and effect." As the majority noted, "This ruling has itself likely contributed to increased inclusion of menorahs in secular holiday displays over the last fifteen years. * * * Indeed, we can find proof of this trend in the lobby of our own Foley Square courthouse, which is decorated in December with a Christmas tree, numerous poinsettia plants, and a menorah." App. 42a-43a.

Quoting its prior opinion in Marchi v. Bd. Of Coop. Educ. Servs., 173 F.3d 469, 476 (2d Cir. 1999), the majority recognize that when "government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause. App. 53a-54a. The majority explicitly found that the DOE made a good faith effort to understand and comply with complex Supreme Court precedents. App. at 40a-43a.

Petitioners admit that they do not seek to exclude the menorah and star and crescent from the examples of

permitted holiday displays, but to mandate inclusion of nativity scenes or crèches. Petition at 8. Thus, they do not object to exposing primary school children to religious symbols, but rather seek to require the display of one of the holiest symbols of their own religion in the primary schools.

As the Christian nativity scene explicitly depicts the Christian deity (the baby Jesus) as the center of a scene of worship, it falls on the wrong side of the line the respondents determined upon to separate permitted from impermissible symbols. The majority correctly found that DOE was reasonable in reasoning that the menorah and star and crescent are only symbols, even if symbols evocative of faith and miracles, and that the nativity scene is more than a symbol; it is an explicit representation of a miracle and of a deity being worshipped.

For example, the majority stated, "A nativity scene undoubtedly qualifies as the depiction of a deity, with the infant Jesus usually being worshipped as God-made-man by adoring angels, shepherds and wise men. While a menorah is understood to commemorate a miracle performed by God, it does not itself depict a deity. Nor does the star and crescent ... [T]he crèche conveys its religious message more representationally and less symbolically than the menorah and the star and crescent. For this reason, the religious significance of a crèche may be more obvious to the average schoolchild than that of the menorah and the star and crescent. Thus, whether or not the respondents' exclusion of the crèche is constitutionally mandated, an objective observer would recognize that the distinction drawn by the Chancellor's counsel reflects a sincere 'effort to avoid transgressing Establishment Clause

limits' [citing to Marchi], and not a religious purpose to endorse Judaism or Islam." App. 53a-54a.

The majority properly concluded its opinion by summarizing the results of its application of the Lemon v. Kurzman test and stating:

> We do not here decide whether the City could, consistent with the Constitution, include a crèche in its school holiday displays. We conclude only that the defendants do not violate the Establishment Clause when, in pursuing the secular goal of promoting respect for the City's diverse cultural traditions, they represent Christmas through a variety of well recognized secular symbols at the same time that they represent Chanukah through the menorah and Ramadan through the star and crescent.

App. 82a.

The Court of Appeals thus properly concluded that the respondents' Holiday Display policy does not violate the Establishment Clause because it does not express a denominational preference or hostility towards Christianity.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL A. CARDOZO
Corporation Counsel of
the City of New York
Attorney for Respondent
100 Church Street
New York, N.Y. 10007
(212) 788-1037 or 1056

Leonard J. Koerner,
Counsel of Record,
Stephen J. McGrath,
Lisa Grumet,
Cheryl Payer,
Of Counsel.

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